No. G045730

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

COSTA MESA CITY EMPLOYEES' ASSOCIATION,
Respondent-Plaintiff,

v.

CITY OF COSTA MESA and THOMAS HATCH, Chief Executive Officer for the City of Costa Mesa,
Appellants-Defendants.

Appeal from Orange County Superior Court
Case No. 30-2011-00475281
Honorable Tam Nomoto Schumann, Judge

APPELLANTS' OPENING BRIEF

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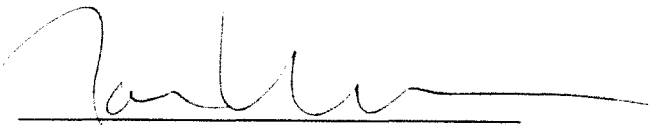
CERTIFICATE OF INTERESTED ENTITIES AND PERSONS

Petitioners City of Costa Mesa and Thomas Hatch are aware of no interested entities or persons that must be listed in this certificate under California Rule of Court 8.208.



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INTRODUCTION

In this preliminary injunction appeal, Appellants-Defendants City of Costa Mesa and its Chief Executive Officer, Thomas Hatch ("Costa Mesa"), seek review of an order that enjoins them from: (i) contracting with a private entity for any service currently being performed by members of Respondent-Plaintiff Costa Mesa City Employees' Association (hereafter "CMCEA")—a union that represents a segment of Costa Mesa's workforce; and (ii) laying off any of CMCEA's members as the result of such contracting efforts.

CMCEA filed suit after Costa Mesa notified certain of CMCEA's members of the possibility of layoffs in the event that Costa Mesa contracted out the services that they perform. Concurrent with the filing of its lawsuit, CMCEA moved for a preliminary injunction to halt Costa Mesa from exercising its discretionary power to contract out.

In support of its motion for preliminary injunction, CMCEA asserted two grounds for relief. First, CMCEA contended that its current Memorandum of Understanding ("MOU") with Costa Mesa prohibits the contracting out of any service currently being performed by CMCEA's members—regardless of whether Costa Mesa contracted with another public agency or a private entity. Second, CMCEA contended that Sections 37103 and 53060 of the Government Code prohibit Costa Mesa from contracting with a private entity for any service other than those that are "specialized" or "expert."

The superior court entered a preliminary injunction solely on the second ground—that Sections 37103 and 53060 of the Government Code restrict Costa Mesa from contracting with private entities for anything but "expert" services. Because the superior court's injunction order allows Costa Mesa to: (i) contract with another public agency for the services currently being performed by CMCEA's members; and (ii) layoff

CMCEA's members pursuant to such contracting efforts, the superior court necessarily rejected CMCEA's first ground for injunctive relief.

Neither ground has merit, however. First, the MOU does not preclude contracting out. Instead, as the superior court's injunction order implicitly recognizes, that agreement, on its face, authorizes the very contracting out that the CMCEA seeks to enjoin. Second, Sections 37103 and 53060 of the Government Code do not impose any restriction on the power of Costa Mesa to contract out. Instead, those statutes codify one of those powers—namely, the power of Costa Mesa to retain "specialized" or "expert" services outside of a competitive bidding process. Thus, the entry of an injunction was improper because there is no likelihood CMCEA will prevail on the merits of its claims.

But even if CMCEA's legal arguments had merit, the superior court's injunction was fatally premature. At the time of the injunction hearing, Costa Mesa had issued only one Request for Proposal ("RFP")—a proposal seeking bids from qualified public and private entities to operate Costa Mesa's jail facility. Costa Mesa did not receive any bids pursuant to that RFP; nor did Costa Mesa enter into any contract for such work (such that the prospect of layoff of any of CMCEA's members would even come into play). Given this procedural posture, CMCEA failed to bear its burden of submitting facts establishing either that it faces an immediate irreparable injury, or that the balance of harms favors an injunction now.

If Costa Mesa receives bids from interested private entities, *if* it elects to accept one of the bids and contract, and *if* it decides to lay off certain CMCEA members as a result of that contracting, CMCEA can move for an injunction. But the present injunction—which necessarily assumes that all these potential developments will occur—must be vacated.

STATEMENT OF APPEALABILITY

This appeal is taken from an order granting a preliminary injunction, which is appealable under Code of Civil Procedure, section 904.1(a)(6). The superior court granted CMCEA's motion for a preliminary injunction on July 15, 2011. (Joint Appendix ("JA") 585.) Appellants filed a timely notice of appeal on August 30, 2011. (Cal. R. Ct. 8.104(a).)

STATEMENT OF THE CASE

CMCEA filed suit on May 16, 2011 against Costa Mesa in Orange County Superior Court seeking declaratory and injunctive relief. (JA 1.) In its First and Second Causes of Action, CMCEA alleges that Sections 37103 and 53060 of the Government Code prohibit Costa Mesa from contracting with private entities for "non-special services that City employees presently perform." (JA 4 ¶ 11.) In its Third and Fourth Causes of Action, CMCEA asserts claims for breach of contract. (JA 6, 8.) More specifically, CMCEA alleges that the MOU between CMCEA and Costa Mesa precludes Costa Mesa from altering the terms and conditions of employment of represented employees through contracting out. (JA 6.)

On the same day it filed suit, CMCEA applied for an order to show cause why a preliminary injunction or temporary restraining order should not issue. (JA 76.) CMCEA requested that the superior court enjoin Costa Mesa from: (i) laying off any worker covered by the MOU between the parties; and (ii) contracting out any service performed by a worker covered by the MOU. (JA 87.)

On July 15, 2011, the superior court granted CMCEA's proposed preliminary injunction. (JA 585.) The injunction restrains Costa Mesa from: (1) "contracting out to any entity which is not a 'Local Agency' within the meaning of California Government Code Section 54980 for services currently performed by City of Costa Mesa employees

represented" by CMCEA; and (2) "laying off City of Costa Mesa employees represented" by CMCEA "as the result of contracting out to any entity which is not a 'Local Agency' within the meaning of California Government Code Section 54980 for those services currently performed by such City of Costa Mesa employees." (*Ibid.*)

The superior court did not set forth its rationale for enjoining Costa Mesa in its written order. It is clear, however, that the superior court granted a preliminary injunction because it concluded that CMCEA was likely to prevail on the merits of its Government Code claims, but not its breach of contract claims. In moving for a preliminary injunction, CMCEA contended that the parties' MOU prohibited Costa Mesa from contracting with *any* entity—public or private. (JA 87.) The superior court apparently did not find that argument compelling, because it refused to enjoin Costa Mesa from contracting out with other public agencies and laying off CMCEA's members pursuant to such contracting efforts. CMCEA also argued that the Government Code prevented Costa Mesa from contracting out with private entities—a position ultimately adopted by the superior court in issuing an injunction.

STATEMENT OF FACTS

CMCEA is a recognized employee organization as defined in Section 3501 of the Government Code. (JA 1-2.) CMCEA is composed of 198 members, who are employed in various departments within Costa Mesa. (*Id.*)

CMCEA alleges that, on March 17, 2011, Costa Mesa issued "layoff notices" to 110 represented employees, with an effective date of September 17, 2011. (JA 2 ¶ 6.) According to CMCEA, layoff notices were sent to its members performing work in the following Departments: City Jail, Information Technology, Telecommunications, Special Event

Safety, Building Inspection, Reprographic, Graphic Design, Street Sweeping, Graffiti Abatement, Park Maintenance, Parkway and Median Maintenance, Fleet Maintenance, Street Maintenance, Facility Maintenance, Animal Control, Payroll, and Employee Benefit Administration. (JA 3 ¶ 8.) CMCEA alleges that Costa Mesa issued the layoff notices as the result of its City Council's decision to outsource various services. (JA 2 ¶ 6.) Costa Mesa allegedly is "currently preparing" RFPs for issuance to non-city entities. (JA 2 ¶ 7.)

In conjunction with its application for a preliminary injunction, CMCEA submitted a copy of the MOU. (JA 97-159.) There are several key provisions of that contract concerning Costa Mesa's right to contract out. Section 14.1 recognizes that Costa Mesa may contract out, and expresses a policy that it would make CMCEA part of those discussions:

> **14.1 POLICY** - It is in the interest of the City of Costa Mesa and CMCEA to establish a consistent policy regarding the City's approach to evaluating the cost of providing municipal services on a regular basis in which CMCEA has an interest. It is recognized that as prudent professionals, the ongoing evaluation of costs should be a collective process of sharing information on a participative basis to develop sound decisions and appropriate practices. The City is interested in involving the employee associations to the greatest degree in this regard; and, as such, agrees to make them part of discussions regarding the *contracting services*.

(*Ibid.* [emphasis added].) The subsequent provision, Section 14.2—which is entitled "Contracting Out"—is a notice provision under which Costa Mesa agreed to provide CMCEA's members with six months notice should Costa Mesa decide to contract out a specific service such members were performing at the time:

> **14.2 CONTRACTING OUT** - It is further agreed that should a decision be made to contract out for a specific service which is at the time being performed by employees

> covered by this MOU, the employees affected will be given sufficient notice (a minimum of six months) in which to evaluate their own situation and plan for their future.

(*Ibid.*) Under Section 19.2(B) of the MOU—contained within the article entitled "**LAYOFF PROCEDURES**"—Costa Mesa agreed that should it decide "to contract out for a specific service performed by City employees," it would: (i) "give the affected employees a minimum of six (6) months advance notification"; and (ii) "meet and confer with CMCEA on such matters as the timing of the layoff and the number and identity of the employees affected by the layoff." (JA 122.) In short, the MOU authorizes Costa Mesa, on six months notice, to: (i) contract out a service performed by CMCEA's members; and (ii) layoff CMCEA's members pursuant to such contracting out.

In support of its motion for preliminary injunction, CMCEA also submitted an example of the alleged layoff notices sent by Costa Mesa to certain of CMCEA's members. (JA 95-96.) The March 17, 2011 letter to an unidentified employee in Costa Mesa's maintenance department provided six months notice that the employee's position was "subject to outsourcing." (JA 95.) The letter notified the employee that he "will be subject to layoff notice effective . . . September 17, 2011." (*Ibid.*) The letter also explained that "[t]his layoff notice is *contingent* upon City Maintenance services being outsourced as initially identified." (*Ibid.* [emphasis added].) Finally, the letter explained that it was "*subject to being rescinded* pending City Council's future action on this matter." (*Ibid.* [emphasis added].)

Although approximately 56% of CMCEA's members were notified that Costa Mesa would be exploring the outsourcing of the specific services they currently are performing, the evidence demonstrated that, at the time CMCEA moved for a preliminary injunction, Costa Mesa had issued only

one RFP. (JA 171.) That RFP sought bids from qualified entities for the operation of the Costa Mesa Police Department's Type I Jail Facility. (*See* JA 177-212.) In that RFP, Costa Mesa noted that any award of work to a public or private contractor was contingent upon the RFP process resulting in the identification of a qualified and willing replacement. (JA 171.) At the time the superior court entered its injunction order, it was entirely uncertain whether the RFP process would actually result in bids—let alone contracts with qualified bidders and subsequent layoffs of CMCEA's members. (*Ibid.*)[1]

STANDARD OF REVIEW

This Court generally reviews a decision to grant a preliminary injunction for an abuse of discretion. (*S.M. v. E.P.* (2010) 184 Cal.App.4th 1249, 1264.) "However, a party's likelihood of prevailing on the merits sometimes can be determined as a matter of law. In that case, de novo review as to that factor is proper." (*Sahlolbei v. Providence Healthcare, Inc.* (2003) 112 Cal.App.4th 1137, 1145-1146 [internal citations omitted].) Thus, "where the grant or denial of a preliminary injunction is dependent upon construction of a statute, and the matter is purely a question of law, the standard of review is not whether discretion was appropriately exercised, but whether the statute was correctly construed." (*Garamendi v. Exec. Life Ins. Co.* (1993) 17 Cal.App.4th 504, 512.)

[1] Since the entry of the superior court's preliminary injunction order, that particular RFP has been rescinded. Given the timing of this action, evidence of Costa Mesa's rescission is not in the record. If requested, Costa Mesa will provide competent evidence to the Court of this action.

ARGUMENT

I. CMCEA FACES NO IMMINENT THREAT OF IRREPARABLE INJURY WARRANTING A PRELIMINARY INJUNCTION

The superior court erred in awarding CMCEA equitable relief because CMCEA failed to satisfy the threshold requirement of imminent irreparable harm.

Before a trial court can exercise its discretion to award injunctive relief, "the applicant must make a prima facie showing of entitlement" by demonstrating "a real threat of immediate and irreparable injury due to the inadequacy of legal remedies." (*Choice-in-Education League v. Los Angeles Unified School Dist.* (1993) 17 Cal.App.4th 415, 422 [quoting *Triple A Machine Shop, Inc. v. State of Cal.* (1989) 213 Cal.App.3d 131, 138]; see also *City of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d 516, 526 ["To qualify for preliminary injunctive relief plaintiffs must show irreparable injury, either existing or threatened." (quotation marks and citation omitted)].) "To satisfy this requirement it is incumbent upon the plaintiff to present *evidence*." (*Loder v. City of Glendale* (1989) 216 Cal.App.3d 777, 783 [emphasis in original].)

When a preliminary injunction is brought against a public agency or officer, a plaintiff's showing is even more demanding: A "significant" showing of irreparable injury is required because there is a "general rule against enjoining public officers or agencies from performing their duties." (*Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471.) "[P]rinciples of comity and separation of powers place significant restraints on courts' authority to order or ratify acts normally committed to the discretion of other branches or officials." (*Butt v. State of Cal.* (1992) 4 Cal.4th 668, 695.)

CMCEA did not satisfy the irreparable injury requirement because it failed to establish a "high degree of *existing or threatened* injury." (*Cohen*

v. Bd. of Supervisors of the City & County of S.F. (1986) 178 Cal.App.3d 447, 454 [emphasis added].) Injunctions cannot be predicated on a plaintiff's mere speculation that the defendant might violate the law. (*Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 750; *Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1083-84 ["[a]n injunction cannot issue in a vacuum based on the proponents' fears about something that may happen in the future"].) Rather, a preliminary injunction properly issues only where "injury is impending and so immediately likely as only to be avoided by issuance of the injunction." (*East Bay Mun. Utility Dist. v. Dept. of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1113, 1126.)

CMCEA failed to bear its burden of showing injury was "immediately likely" without an injunction. At the time CMCEA moved for a preliminary injunction, the sum total of the evidence supporting that relief consisted of the following: (i) Costa Mesa's issuance of a notification to certain of CMCEA's members that they *could* (not would) be subject to layoff *if* Costa Mesa contracted out their position—a notification that was both "contingent" and "subject to being rescinded"; and (ii) Costa Mesa's issuance of *one* RFP (for the operation of its jail facility). (JA 171.)

There is no evidence that Costa Mesa has decided to contract out any particular service or even scheduled such a determination. Indeed, at the time CMCEA moved for a preliminary injunction, Costa Mesa had not even received bids from, much less entered into a contract with, private contractors. Thus, CMCEA's concern that its members will lose their jobs to private contractors is not based upon realistic prospects, but speculative fear. Since the threat of irreparable harm is speculative, no injunction should have issued. (*Gold v. Los Angeles Democratic League* (1975) 49 Cal.App.3d 365, 372-73 [injunction proper only where it "appear[s] with reasonable certainty that wrongful acts" will occur].)

CMCEA should return to court when the threat of layoffs are impending. Thirty days before it may layoff any CMCEA-represented member, Costa Mesa must notify the City's Administrative Services Director of the intended action. (JA 122.) When (and if) Costa Mesa ever notifies the Administrative Services Director of an impending layoff, CMCEA can then seek injunctive relief on behalf of the affected employee(s). Thirty days is ample time to obtain a preliminary injunction, if one is even warranted.

CMCEA's failure to establish the threat of immediate injury takes on special significance here because it seeks to halt a legislative process. Injunctions "[t]o prevent a legislative act by a municipal corporation" are prohibited (Code Civ. Proc., § 526(b)(7)), because the plaintiff "will have an adequate remedy by action to enjoin its enforcement if it is enacted and if enforcement is attempted." (6 Witkin, Cal. Procedure (5th ed. 2008) Provisional Remedies, § 332, pp. 277-278.) Thus, in *Johnston v. Board of Supervisors of Marin County* (1947) 31 Cal.2d 66, the Supreme Court reversed the trial court's injunction barring county legislators from adopting an ordinance because, even if the contemplated action exceeded the legislature's authority, the plaintiff failed to establish that the mere passage of the ordinance itself "without 'any attempt to enforce it would instantly produce irreparable injury.'" (*Id.* at p. 71 [citation omitted].) "Obviously," the Court held, "plaintiff cannot make such a showing, for if the ordinance is illegally enacted, he will have an adequate remedy in his right to seek an injunction restraining its enforcement or restraining anyone from [taking the authorized action] pursuant to it." (*Ibid.*)

Johnston compels dissolution of the superior court's injunction. CMCEA did not (and cannot) show that it suffered irreparable injury the instant Costa Mesa notified CMCEA's members that it was contemplating contracting with a private entity for the provision of services. As in

Johnston, CMCEA will have an adequate remedy if Costa Mesa contracts with a private entity because CMCEA then can seek an injunction restraining enforcement of the contract and restraining Costa Mesa from laying off CMCEA's members pursuant to it. At this point in time, however, "an injunction is not the proper remedy in this case." (*Johnston*, *supra*, 31 Cal.2d at p. 71.)

II. CMCEA IS UNLIKELY TO PREVAIL ON THE MERITS

Even if CMCEA had established a credible threat of irreparable injury (and it did not), the superior court erred by awarding an injunction because CMCEA is not likely to prevail on the merits of its claims.

Trial courts are expected to evaluate two interrelated factors when deciding whether to issue a preliminary injunction: (1) the likelihood that the plaintiff will prevail on the merits at trial; and (2) the interim harm that the plaintiff is likely to suffer if the injunction were denied as compared to the harm the defendant is likely to suffer if the preliminary injunction were issued. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70.) A trial judge may not grant a preliminary injunction—regardless of the balance of interim harm—if it is unlikely that the plaintiff will ultimately prevail on the merits. (*Butt*, *supra*, 4 Cal.4th at p. 678.)

As demonstrated below, CMCEA failed to demonstrate a reasonable possibility of prevailing on the merits at trial, either under its breach of contract or Government Code theories of liability. For this independent reason, the superior court's injunction should be vacated.

A. CMCEA is Unlikely to Prevail on its Breach of Contract Claims

There is no reasonable possibility that CMCEA will prevail on its claim that the parties' MOU precludes Costa Mesa from contracting out

services. This is so because the contract upon which that claim is based *authorizes* the very contracting out that CMCEA seeks to enjoin.

California law requires public entities, like Costa Mesa, to negotiate the terms and conditions of employment for their employees under the rules set forth in the Meyers-Milias-Brown Act ("MMBA"). (Gov. Code, §§ 3500-3511.) The end-result of the collective bargaining process under the MMBA is a Memorandum of Understanding between the public entity and the employees' bargaining unit. The MMBA "does not permit [] employees to accept the benefits of a collective bargaining agreement and reject less favorable provisions." (*San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1224-1225.) That, however, is precisely what CMCEA seeks to accomplish through its breach of contract claims.

By its plain terms, the MOU authorizes Costa Mesa to contract for services performed by employees covered by the MOU with either public or private entities:

- Section 14.1 of the MOU recognizes this right, and expresses a "policy" that Costa Mesa agrees to make its employees part of the discussions regarding the future contracting out of services: "The City is interested in involving the employee associations to the greatest degree in this regard; and, as such, agrees to make them part of discussions regarding the contracting services." (JA 121.) If, as CMCEA erroneously contends, the MOU prohibits Costa Mesa from contracting out, Section 14.1—under which Costa Mesa agreed to make the CMCEA part of the discussion regarding the contracting out of services—would be rendered meaningless, in contravention of California law. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473 ["Courts must interpret contractual language in a manner which gives force and

effect to every provision, and not in a way which renders some clauses nugatory, inoperative or meaningless."].)

- Under Section 14.2 of the MOU, Costa Mesa "further agreed" to provide CMCEA's members with six months notice should future contracting efforts extend to a specific service being performed by such employees at that time. (JA 121.) The same provision requires Costa Mesa to "make every effort to transfer and utilize regular attrition in making the necessary adjustments" and to "assist employees in this endeavor through training and through preferential treatment (under meritorious consideration) when filling vacancies." (*Ibid.*) CMCEA's position that the MOU forbids Costa Mesa from contracting out would render Section 14.2 meaningless as well.

- Under Section 19.2(B) of the MOU—contained within the article entitled "**LAYOFF PROCEDURES**"—Costa Mesa further agreed that should it decide "to contract out for a specific service performed by City employees," it: (i) would "give the affected employees a minimum of six (6) months advance notification"; and (ii) would "meet and confer with CMCEA on such matters as the timing of the layoff and the number and identity of the employees affected by the layoff." (JA 122.) Costa Mesa also agreed to notify the City's Administrative Services Director within thirty days before the layoff effective date of the reasons therefore. (*Ibid.*) Contrary to CMCEA's claims, Section 19.2 of the MOU further recognizes that CMCEA's members can be laid off if Costa Mesa decides to contract out a specific service those members perform.

Legal principles applicable to ordinary contracts have relevance to labor agreements like the one at issue here. (See *Crowley v. City & County of S.F.* (1976) 64 Cal.App.3d 450, 458.) It is a bedrock principle of contract interpretation that contracts must be interpreted to effect the purpose of the parties. (See *Jones v. Jacobson* (2011) 195 Cal.App.4th 1,

17.) The fact that the MOU obligates Costa Mesa to take certain actions if it lays off CMCEA-represented members as a result of contracting out proves, *ipso facto*, that the parties contemplated that Costa Mesa could contract out services being performed by CMCEA's members. The parties would not have bothered to draft a provision for six months notice if Costa Mesa was barred from contracting out services.

As the record before the superior court revealed, Costa Mesa not only is authorized by the MOU to contract out, but it complied with the only limitations on contracting out imposed by the MOU: Costa Mesa sent letters to CMCEA members on March 17, 2011; the letters expressly referenced the six-month notice period; and it informed the affected employees of the possibility of termination. (See, e.g., JA 95-96.) Nothing more was required.

Against this record, CMCEA advanced the curious argument that the MOU actually precludes Costa Mesa's actions because Section 14.2—i.e., the six month notice provision—refers only to the contracting out of "*specific* services." (JA 85 [emphasis in original].) According to CMCEA, the MOU prevents Costa Mesa from contracting out "virtually all City services." (*Ibid.*) As explained above, it is evident that the superior court—by refusing to enjoin Costa Mesa from contracting out services to other public entities—rejected CMCEA's argument. CMCEA's argument fares no better on appeal.

First, on its face, Section 14.2 is a *notice* provision—not a limitation upon Costa Mesa's authority to contract out. The introductory phrase to that section—"further agreed"—makes this clear. Put differently, Costa Mesa's authority to contract out under the MOU does not arise from Section 14.2; instead, that section merely sets forth the *notice* that Costa Mesa agreed to provide employees covered by "this MOU" (as opposed to

employees covered by a different MOU) should Costa Mesa decide to exercise its power to contract out.

Second, Section 14.2 states that affected employees must be given six months notice if a decision is made "to contract out for *a* specific *service*" they happen to be performing at the time. (JA 121 [emphasis added].) Section 14.2 does not state that Costa Mesa may only contract out some unspecified set of "specific services." If the parties intended for that construction, they would have actually identified the services that may or may not be contracted out. Regardless, CMCEA adduced no evidence to the trial court that the services subject to the layoff notices were not "specific services" covered by Section 14.2 (even if that provision was subject to such a reading). Similarly, CMCEA proffered no evidence that Costa Mesa sought to contract out "virtually all City services" (even if the MOU could be read to prevent that from happening). Instead, the evidence showed only that approximately 56%—about half, not "virtually all"—of CMCEA members received notice of a potential layoff.

Contrary to the MOU's plain language, CMCEA also contended below that Costa Mesa cannot contract out without violating one of the MOU's preamble provisions. (JA 85-87 [citing Section 1.5 of the MOU].) In relevant part, that provision states that "[t]he wages, hours and other terms and conditions of employment currently in effect for the job classifications covered herein shall remain in effect unless modified, amended, or deleted by this MOU or subsequent MOUs." (JA 100.) CMCEA's contention fails for two reasons.

First, Section 1.5 cannot operate to change the language in Sections 14.1, 14.2 and 19.2(B) as those provisions *are* the "terms and conditions of employment." Put differently, by contracting out, Costa Mesa cannot possibly be altering any the "terms and conditions of employment currently in effect" under the MOU because, paradigmatically,

Costa Mesa is simply exercising an already agreed-upon "term and condition of employment," which includes: (i) a right to contract out; and (ii) a right to layoff employees covered by the MOU pursuant to those contracting efforts. Having agreed that the City holds such rights, the CMCEA cannot now invoke Section 1.5 to argue that such rights do not exist. Thus, the only party unilaterally seeking to modify the terms of the MOU in violation of Section 1.5 is the CMCEA.

Second, even if Section 1.5 somehow applies to Costa Mesa's planned actions, its terms would be trumped by Sections 14.1, 14.2, and 19.2. For over one hundred years, California law has required that specific contractual provisions prevail over conflicting general provisions. (See *Scudder v. Perce* (1911) 159 Cal. 429, 433 [recognizing the "the familiar rule that when general and specific provisions of a contract deal with the same subject-matter, the specific provisions, if inconsistent with the general provisions, are of controlling force"].) To the extent they conflict, Sections 14.1, 14.2 and 19.2—which specifically contemplate and address Costa Mesa's right to contract out—prevail over the generic principles expressed in the introductory provision relied upon by the CMCEA.

In short, from the face of the MOU, it is apparent that the CMCEA has no reasonable possibility—let alone probability—of prevailing on its contract claims. Moreover, because, under California law, a court is obligated to *enforce*—not enjoin—the exercise of collectively-bargained for rights under a MOU (see *Porter v. Quillin* (1981) 123 Cal.App.3d 869, 876 [provisions of the MOU control over contrary statutory provision], cited with approval by the Supreme Court in *San Lorenzo Ed. Assn. v. Wilson* (1982) 32 Cal.3d 841, 846 [noting that "courts will relax this rule only where enforcement of a collective bargaining term would contravene an extraordinarily strong and explicit state policy"]), the superior court's

injunction order, which effectively restrains Costa Mesa from exercising rights it holds under its MOU, must be dissolved.

B. CMCEA is Unlikely to Prevail on its Claims Under the Government Code

The superior court granted a preliminary injunction because it accepted CMCEA's argument that it was likely to prevail on its claims under Sections 37103 and 53060 of the Government Code. The crux of CMCEA's two-step argument is that Sections 37103 and 53060 prevent a municipality from contracting out to private entities any service that is not a "special service," and an injunction is necessary to enjoin Costa Mesa from contracting out non-expert services. In issuing a preliminary injunction that adopts that erroneous legal conclusion, the superior court erred.

First, as a wall of precedent conclusively establishes, general law cities, like Costa Mesa, have been vested with broad constitutional and statutory powers to contract in the private sector for services, including those currently being performed by CMCEA's members. Sections 37103 and 53060 of the Government Code do nothing more than codify one of those many powers—namely, the power to retain "specialized" or "expert" services outside of the competitive bidding process.

Second, even if Costa Mesa's contemplated actions would implicate Sections 37103 and 53060, the issuance of an injunction now—before Costa Mesa has even identified a private contractor with which it desires to contract—is fatally premature. Only when a private contractor has been identified can a court possibly determine whether the service they intend to offer is "special" or not.

1. The Superior Court's Analysis Should be Reviewed De Novo

In its order, the superior court did not set forth its reasons for granting CMCEA's requested injunction. (See JA 585.) Yet, as explained above, it is apparent from the injunction's form that the court accepted CMCEA's argument that, should Costa Mesa contract out services performed by CMCEA's members with private entities, Costa Mesa would violate Sections 37103 and 53060 of the Government Code.

Whether Costa Mesa is precluded by the Government Code from contracting out services to private contractors is a pure question of law, which should be reviewed de novo. Counsel for CMCEA agrees. (See Appellant's Opening Brief, *Orange County Employees Assn. v. County of Orange* (Cal. Ct. App., Feb. 22, 2007, No. G037828) 2007 WL 1089013, at pp. *13-14 [characterizing question of whether county was authorized by Government Code to contract out services to a private entity as "a classic example of a pure question of law"].) Even under the abuse of discretion standard, however, the superior court's likelihood of success analysis should be reversed.

2. Costa Mesa Possesses Broad Powers To Contract Out Services Being Performed By CMCEA's Members

Under California's Constitution and statutory laws, a general law city, like Costa Mesa, is authorized to contract in the private sector for services that Costa Mesa is not "required by law" to provide with only its classified employees.

The California Constitution vests Costa Mesa with this broad discretionary power:

> A city may make and enforce within its limits *all* local, police, sanitary, and other ordinances and regulations *not in conflict with general laws*.

(Cal. Const., art. XI, § 7 (emphasis added); see also Gov. Code, § 37100 ["The legislative body [of a city] may pass ordinances not in conflict with the Constitution and laws of the State or the United States."].)

As stated in *Morrison Homes Corp. v. City of Pleasanton* (1976) 58 Cal.App.3d 724, this broad grant of constitutional power, "by necessary implication," authorizes a general law city to "enter into contracts which enable it to carry out its necessary function, and this applies to powers expressly conferred upon a municipality and to powers implied by necessity." (*Id.* at p. 734 [citing *Carruth v. City of Madera* (1965) 233 Cal.App.2d 688 (explaining that "the law is clear that a city has authority to enter into contracts which enable it to carry out its necessary functions, and this applies to powers expressly conferred upon a municipality and to powers implied by necessity")]; *Amaral v. Cintas Corp.* (2008) 163 Cal.App.4th 1157, 1175 [holding that "[i]t is beyond dispute" that a city has "the power to enter contracts to carry out its necessary functions"].)

As the Supreme Court has emphasized, unless a local agency is "obligated by law" to provide a particular service with a specified public employee or officer (see, e.g., *Tax Factors v. County of Marin* (1937) 20 Cal.App.2d 79 [county assessor is obligated by law to value all property in the county; thus, a county could not contract out those duties to someone else]), a general law city may contract in the private sector for services, including those being performed by its classified workers. In rejecting a challenge to a city's contract for engineering services that, before that contract was entered, were being performed by classified employees, the Supreme Court explained this constitutional distinction thusly:

> The cases cited by respondent . . . do not support his contention that the proposed contract is void by reason of its alleged illegal duplication of the functions and duties of existing officers, departments and commissions. *In each of the cited cases the function which the contract had attempted*

> *to duplicate had been specifically, by statute, imposed upon a specified officer*.

(*City & County of San Francisco v. Boyd* (1941) 17 Cal.2d 606, 618 [emphasis added].) CMCEA did not below, and will not on appeal, identify any general law that obligates Costa Mesa to provide the services performed by CMCEA's members with *only* classified workers.

Like the Constitution, Section 37112 of the Government Code provides Costa Mesa with broad power to contract in the private sector for services performed by CMCEA's members:

> In addition to other powers, a legislative body [of a general law city] may perform *all acts* necessary or proper to carry out the provisions of this title.

(Gov. Code, § 37112 (emphasis added).) The enabling phrase—"*all acts*"—cannot be read as a *restriction* on the power of Costa Mesa.

As interpreted by California's Attorney General, this broad grant of statutory power means exactly what it says, and authorizes general law cities, like Costa Mesa, to contract out for services that a city is not required by law to provide with only its classified workers. (74 Ops.Cal.Atty.Gen. 109 (1991) [holding that, unlike general law counties—which are *required by law* to have their jails supervised by the county sheriff (see Penal Code, § 4000 et seq.)—a general law city is not so constrained and, therefore, may contract out the *operation of its jails* to a *private firm*: "In the absence of any law which would prohibit a city from establishing a private detention facility, we believe that section 37112 of the Government Code grants the basic authority to do so."]; cf. *New Hampshire Ins. Co. v. City of Madera* (1983) 144 Cal.App.3d 298, 307 [explaining that, "[w]hile Government Code section 38611 requires general law cities to establish fire departments . . . decisions regarding its management and operations are left to the legislative discretion of the city"].)

Like the Attorney General, the California Department of Corrections and Rehabilitations also recognizes that a general law city may "establish[] a privately operated detention facility," and that "[t]here are currently 10 cities that have contracted with private firms to operate city jails: Alhambra, Baldwin Park, Bell, Chino, Irvine, Montebello, Palm Springs, San Bernardino, Seal Beach, and South Pasadena, and others are reportedly considering this option." (See Cal. Dept. of Corrections & Rehabilitation, Privately Operated Local Detention Facilities (Feb. 1999), http://www.cdcr.ca.gov/CSA/FSO/pvt_jails.html.)

Although the *only* RFP that Costa Mesa had issued at the time the superior court entered its injunction order was for a service for which the Attorney General and Department of Corrections have recognized that a general law city *may* obtain from the private sector—i.e., the operation of a city jail—a local agency's power to contract in the private sector, as our courts have recognized, extends to other services performed by CMCEA's members.

For example, like operating its jails, nothing in the general laws requires a local agency to provide property maintenance services with only its classified workers—the holding in *California School Employees Association v. Kern Community College District Board of Trustees* (1996) 41 Cal.App.4th 1003 (hereinafter "*Kern*"). The issue addressed in *Kern* was whether a local agency could contract with a private vendor (C & C Lawn Service) to provide grounds keeping / maintenance services that, at the time, were being performed by the local agency's classified employees. The *Kern* court held that this contract was proper because the local agency was not "required by law" to provide such services with only its classified employees—notwithstanding the fact that "[p]rior to the contract with C & C, all of the District's grounds keeping work was performed exclusively by the District's classified workers." (*Id.*, at p. 1006.)

Following *Kern*, the Court of Appeal in *Service Employees International Union, Local 715, AFL-CIO v. Board of Trustees of the West Valley/Mission Community College District* (1996) 47 Cal.App.4th 1661 ("*SEIU*") held that a local agency was permitted to contract with a private vendor to replace its bookstore clerks because the local agency was not "required by law" to provide such services with only classified workers. In reaching that conclusion, the *SEIU* court explained that, although the law "does not specifically authorize the District to contract out its bookstore operations, it does not need to" because the law "does not require that all work be performed by the classified employees" of a local agency. (*Id.* at pp. 1666, 1672.)[2] Like *Kern*, the *SEIU* case thus confirms that local agencies, so long as they are not required by law to provide a particular service with only their classified workers, may lawfully contract out services to private entities under their broad grants of authority.[3]

3. The "Special Services" Provisions of the Government Code Do Not Restrict the Power of Costa Mesa to Contract in the Private Sector

Because the California Constitution and Section 37112 of the Government Code vest Costa Mesa with the power and discretion to contract out for services performed by CMCEA's members, the Court must

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[2] For purposes of the opinion, the Court in *SEIU* assumed, but by no means held, that Section 53060 of the Government Code "could operate to undermine the authority granted the District under the permissive Education Code." (*SEIU*, *supra*, 47 Cal.App.4th at p. 1672.) For the reasons explained below, Section 53060 cannot be interpreted in such manner.

[3] The opinions of California's Attorney General are in accord. (See, e.g., 93 Ops.Cal.Atty.Gen. 63, 2010 WL 2888356, at p. *3 (2010) [local agency may contract with a *private* nonprofit organization to provide at-risk student dropout prevention and retention programs because the agency is not "required by law" to provide such services with only classified employees].)

address the question left open in *SEIU*: Whether the "special services" statutes undermine that authority. (*SEIU*, *supra*, 47 Cal.App.4th at p. 1672.) As demonstrated below, they do not.

a. CMCEA Misconstrues the Purpose and Meaning of the "Special Services" Statutes

CMCEA argues that Costa Mesa's power to contract for services is limited by Sections 37103 and 53060 of the Government Code. (JA 82-84.) That argument fundamentally misunderstands the purpose and import of Sections 37103 and 53060 of the Government Code. Those statutes do nothing more than codify the power of general law cities to contract for "experts" outside of the competitive bidding process.

The analysis is straightforward. In California, "cities ... are required to put significant contracts out for competitive bidding and to award the contract to the lowest responsible bidder." (*Valley Crest Landscape, Inc. v. City Council of the City of Davis* (1996) 41 Cal.App.4th 1432, 1438 [citing Pub. Contract Code, § 20162].) Sections 37103 and 53060 of the Government Code authorize a municipal legislature to contract with and, critically, *pay compensation as it deems proper to*, "specially trained" entities for "special services" in financial, economic, accounting, engineering, legal, or administrative matters.[4] By authorizing

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[4] The language of sections 37103 and 53060 is similar, though not identical. Section 37103 provides:

> The legislative body may contract with any specially trained and experienced person, firm, or corporation for special services and advice in financial, economic, accounting, engineering, legal, or administrative matters.
>
> It may pay such compensation to these experts as it deems proper.

(Gov. Code, § 37103.) Section 53060 provides:

municipalities to pay the providers of "special services" as they deem proper, the statutes thus excuse municipalities from subjecting contracts for "special services" to the *competitive bidding process*.[5]

In the 1930s and 1940s, California courts held that because certain jobs—such as architect or engineer—require taste, skill and technical learning and ability of a rare kind, "[t]he employment of a person who is highly and technically skilled in his science or profession is one which may properly be made without competitive bidding." (*Boyd, supra*, 17 Cal.2d at p. 620; see also *Adams v. Ziegler* (1937) 22 Cal.App.2d 135, 137-138 ["Provisions in city charters as to competitive bidding are not applicable to contracts for personal services depending upon the personal skill or ability of the individual."].)

(continued...)

> The legislative body of any public or municipal corporation or district may contract with and employ any persons for the furnishing to the corporation or district special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required.
>
> The authority herein given to contract shall include the right of the legislative body of the corporation or district to contract for the issuance and preparation of payroll checks.
>
> The legislative body of the corporation or district may pay from any available funds such compensation to such persons as it deems proper for the services rendered.

(Gov. Code, § 53060.)

[5] Other states similarly exempt professional or special service contracts from competitive bidding requirements. (See, e.g., Mass. Gen. Laws ch. 30B, § 1(b)(32A); N.J. Stat. Ann. § 40A:11-5(1)(a)(i); Ohio Rev. Code Ann. § 307.86; 16 Pa. Stat. Ann. § 1802(h)(5).)

Boyd and *Adams* were decided *before* Sections 37103 and 53060 were enacted. By enacting Section 37103 in 1949, and Section 53060 in 1951, the California legislature codified these earlier decisions, and "remove[d] all question of the necessity of advertising for bids for 'special services' by a person specially trained and experienced and competent to perform the special services required." (*Cobb v. Pasadena City Bd. of Ed.* (1955) 134 Cal.App.2d 93, 95-96.)

CMCEA improperly seeks to transform Sections 37103 and 53060 of the Government Code—which *expanded* the powers of municipal legislatures by voiding the requirement of competitive bidding for special service contracts—into a *limitation* on the right of municipalities to contract out. In entering a preliminary injunction order that adopts this position, the superior court erred.

b. The "Special Services" Statutes Do Not (and Cannot) Impliedly Repeal The Powers That Costa Mesa Holds Under the Constitution, Government Code and MOU

Even if the Court were to find that Sections 37103 and 53060 of the Government Code do more than codify existing law, these statutes plainly do not restrict, forbid or impliedly repeal the *other* powers Costa Mesa indisputably holds under the Constitution, the Government Code, and its MOU to contract for services performed by CMCEA's members.

Neither "special services" statute states that a local agency may *only* contract out to private entities for special or "expert" services, or even silently implies that the Legislature intended to curb a general law city's constitutional and statutory rights to contract out other types of services. Nor do they in any way restrain Costa Mesa from contracting for other types of services as provided under the MOU. As a wall of precedent decided *after* Sections 37103 and 53060 were enacted confirms, the

Legislature clearly did not intend to do so. (See, e.g., *Morrison Homes*, *supra*, 58 Cal.App.3d at p. 734; *Carruth*, *supra*, 233 Cal.App.2d at p. 695 *Kern*, *supra*, 41 Cal.App.4th at pp. 1011-13; *SEIU*, *supra*, 47 Cal.App.4th at pp. 1673-75; 74 Ops.Cal.Atty.Gen. 109 (1991); 93 Ops.Cal.Atty.Gen. 63 (2010).)

Contrary to CMCEA's position, it should not be assumed that the California legislature intended to limit the right of municipalities to contract out for services when it did not expressly say so. (See *Sabatasso v. Superior Court* (2008) 167 Cal.App.4th 791, 797 [holding that courts should not presume an intent to legislate by implication, except where the implication "is so strong in its probability that the contrary thereof cannot reasonably be supposed" (quotation marks and citation omitted")]; *Gray v. Superior Court* (2002) 95 Cal.App.4th 322, 327 ["It is axiomatic that in construing or interpreting legislation, the courts should not imply additional language in order to accomplish some supposed legislative purpose, at least not without very clear indications that the purpose was intended."].)

In analogous cases, California courts have resisted reading statutes as implicitly limiting the right of public agencies to contract out. In *Kern*, *supra*, a union sued a non-merit school district to enjoin it from subcontracting grounds keeping services. The union argued that contracting out to a private entity would violate Education Code, section 88003, which provides that covered districts "shall employ persons for positions that are not academic positions" and "shall ... classify all such employees and positions." (*Kern*, *supra*, 41 Cal.App.4th at p. 1006.) In essence, the union contended that because Section 88003 positively requires covered school districts to employ non-academic personnel, it negatively implies that school districts cannot contract out the same positions to private entities. (See *id.* at p. 1010.)

The court rejected that interpretation, reasoning that although Section 88003 compelled the defendant to classify all of its own non-academic employees, it did not require that all work be performed by those classified employees. (*Kern*, *supra*, 41 Cal.App.4th at p. 1012.) The court noted that when the California legislature wants to prohibit public agencies from contracting out, it knows how to do so. (*Id.* at p. 1011 [quoting Educ. Code, § 45256 ("No person whose contribution consists solely in the rendition of individual personal services and whose employment does not come within the scope of the exceptions listed above shall be employed outside the classified service.")].) So too here, because the California legislature has not expressly prohibited municipalities from contracting out to private entities for non-"expert" services, they retain that power under well-settled doctrines of municipal authority.

c. The Legislative History Undercuts CMCEA's Interpretation of the "Special Services" Statutes

To the extent Sections 37103 and 53060 of the Government Code are ambiguous, their legislative history refutes CMCEA's contention that the legislature intended to undermine the authority of general law cities to contract out for services. (See *Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [where statutory language is ambiguous, court may look to legislative history to ascertain intent].)

Most of the legislative history behind the enactment of the "special services" statutes no longer exists. The legislative committees that enacted Section 37103 in 1949 left no materials documenting their consideration. The same is true of Section 53060's enactment in 1951. There remains, however, one insightful document behind the enactment of Section 53060, which confirms that the legislature, in enacting that statute, had no intention of limiting the powers of general law cities to contract out services.

On May 9, 1951, the Deputy Attorney General prepared an Inter-Departmental Communication for Governor Warren regarding Section 53060.[6] The Communication noted that the authority of cities to retain technical experts rests upon express and implied grants of power. (Cal. Dept. of Justice, Inter-Departmental Communication to Governor re Assembly Bill 2856 (May 9, 1951) p. 1.) "Even aside from express authority, public agencies may contract for expert technical services where necessary to the performance of their functions. To that extent, the bill would add nothing to the powers already possessed by such agencies." (*Ibid.* [citing *City & County of S.F. v. Boyd* (1941) 17 Cal.2d 606; *Skidmore v. County of Amador* (1936) 7 Cal.2d 37].) The Department of Justice noted, however, that one purpose of the statute was to respond to a line of cases holding that public agencies may not hire experts to perform services that public officials are required by law to perform. (*Ibid.* [citing *Tax Factors*, *supra*, 20 Cal.App.2d at p. 79; *MacLeod v. Long* (1930) 110 Cal.App. 334].)

The Department of Justice's memo confirms that, contrary to CMCEA's position, the legislature did not enact Section 53060 to limit the power of municipalities to contract out services. Nor did the legislature enact Section 53060 to fill a void in authority on the part of legislative bodies to contract for "special services." Rather, Section 53060 merely *reaffirmed* the power of general law cities to contract out services to private entities. One limited purpose was to rectify authority with which the Legislature apparently disagreed—that which had invalidated contracts for expert services when those services "had been specifically, by statute,

[6] California courts have used Inter-Departmental Memos as a valid source of legislative history. (See, e.g., *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 533; *Transamerica Occidental Life Ins. Co. v. State Bd. of Equalization* (1991) 232 Cal.App.3d 1048, 1058 fn. 2.)

imposed upon a specified officer." (*Boyd, supra*, 17 Cal.2d at p. 618.)[7] CMCEA made no showing, however, that Costa Mesa seeks to contract out any services that a public officer is obligated by law to perform.

d. CMCEA's Request for an Injunction is Predicated on Inapposite Authority

In seeking a preliminary injunction, CMCEA did not cite a single case or other authority that holds (or even suggests) that Sections 37103 and 53060 preclude a general law city from contracting out services as authorized under the California Constitution and Section 37112 of the Government Code. Instead, CMCEA relied upon inapposite authority that can be arranged into three categories.

First, CMCEA cited precedent where a court precluded a public agency from contracting out because a statute *expressly prohibited* the agency's action. (JA 223.) In *California School Employees Association v. Del Norte County Unified School District Board of Trustees* (1992) 2 Cal.App.4th 1396, a merit school district contracted with a private entity to supervise maintenance and custodial operations. The Court of Appeal invalidated the contract on the ground that it violated a statute prohibiting merit districts from hiring from "outside the classified service" any "person whose contribution consists solely in the rendition of individual personal services." (*Id.* at pp. 1403-1404 [quoting Educ. Code, § 45256(b)]; see also *Kern, supra*, 41 Cal.App.4th at pp. 1011-1012 [interpreting *Del Norte*].)

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[7] Ironically, California courts, perhaps unaware of Section 53060's legislative history, have continued to invalidate contracts for special services where a public official is statutorily obligated to perform the same function. (See *Jaynes v. Stockton* (1961) 193 Cal.App.2d 47, 54 ["the courts of this state have expressly stated or impliedly recognized the rule that a public agency created by statute may not contract and pay for services which the law requires a designated public official to perform without charge, unless the authority to do so clearly appears from the powers expressly conferred upon it"].)

Notably, CMCEA has not identified any statute that expressly prohibits Costa Mesa from contracting out any of the services being performed by CMCEA's members.

Second, CMCEA cited precedent where a public agency was not permitted to contract out for services because a public employee was statutorily *required* to perform the same function. (JA 223.) For example, CMCEA relied on *Jaynes v. Stockton* (1961) 193 Cal.App.2d 47, which invalidated a contract a school district had entered for legal services. (See *id.* at p. 49.) The school district used a private firm to advise its board of trustees about a school problem, even though county counsel "is required to give his opinion in writing to school district officers on matters relating to the duties of their offices." (*Id.* at p. 52 [citing Gov. Code, § 26520].) The court held that the private contract could not be considered a contract for special services because a public official was available—indeed obligated by law—to provide the same service. (*Id.* at p. 53.) *Jaynes* followed in the footsteps of a long line of cases holding that public agencies may not "duplicate" services that have "been specifically, by statute, imposed upon a specified officer." (*Boyd, supra*, 17 Cal.2d at p. 618 [citing authority].)[8]

Similarly, CMCEA's argument finds no support in a 2002 opinion by the Attorney General concluding that a general law city may not enter into a contract with a private security company to issue citations for Vehicle Code parking violations. (JA 84, citing 85 Ops.Cal.Atty.Gen. 83 (2002).) That opinion concerned a service—the issuance of parking

[8] In *Montgomery v. Superior Court* (1975) 46 Cal.App.3d 657, the court, in approving a contract between a city and a private attorney to act as a prosecutor, explained that, unlike in *Jaynes*, general law cities are not "obligated by law" to have their employees serve as prosecutors. Thus, the fact that there were city employees that could have served the role of prosecutor did not prevent the city from contracting out for those services under Section 53060 because that was not a service the city was "obligated by law" to obtain through public sources. (*Id.* at p. 668.)

citations—that, by statute, may only be performed by an "issuing officer," which has been specifically defined as peace officers or other municipal employees. (63 Ops.Cal.Atty.Gen. 719 (1980).) Here, in sharp contrast, Costa Mesa seeks to contract out services that CMCEA's members are *not* otherwise obligated to perform, thereby "produc[ing] substantial financial benefits" to the public. Thus, *Jaynes* and 85 Ops.Cal.Atty.Gen. 83 are inapposite. (*SEIU, supra*, 47 Cal.App.4th at p. 1674.)

Third, CMCEA cited precedent where the defendant lacked a general grant of authority, such as Section 37112, and therefore attempted to justify its contract on the basis of the special services statutes *alone*. These cases stand for the unremarkable proposition that Sections 37103 and 53060 themselves do not authorize a public agency to contract out for anything but "special services." But none of these authorities suggest that the "special services" statutes prevent public agencies from contracting out under *other* grants of authority.

For example, CMCEA relied on *California School Employees Association v. Sunnyvale Elementary School District* (1973) 36 Cal.App.3d 46. (JA 83-84.) That case, which was decided before the California legislature adopted a permissive code structure for school districts in 1976, concerned a school board's power to contract out certain services. Because the case was decided *before* school districts were authorized to carry out acts not inconsistent with any law, the court assumed that the defendant had "'only such authority as is specifically granted by the Legislature, to be exercised in the mode and within the limits permitted by the statute.'" (*Sunnyvale, supra*, 36 Cal.App.3d at p. 60 [citation omitted].) As the school board in *Sunnyvale* could not rely on a general grant of authority as

justification for its intended contracting out of services, it argued that Section 53060 itself granted such authority. (*Ibid.*)[9]

For similar reasons, CMCEA does not find support in a 1993 Attorney General opinion, which held that Section 53060 does not authorize a general law county to contract with persons to perform services provided by its civil service employees *solely* to save money. (JA 224-225 [discussing 76 Ops.Cal.Atty.Gen. 86, 1993 WL 141682, at p. *4 (1993)].) In that opinion, the Attorney General reasoned that because Section 53060 "is expressly limited to 'special services' in specified areas," the statute does not authorize a county to contract for other services. (76 Ops. Cal. Atty. Gen. 86, 1993 WL 141682, at pp. *2-3.) Unlike the county under review in the Attorney General opinion, however, Costa Mesa is not seeking to contract out "without statutory authority" and under Section 53060 alone. Rather, Costa Mesa relies upon the powers it holds under the Constitution and Section 37112 of the Government Code, as both our courts and Attorney General have concluded it is entitled to do.

In the court below, CMCEA relied heavily on the Attorney General's dicta that because the California Legislature has authorized the State Government to contract out personal services to reduce expenses (see Gov. Code, § 19130), it may be inferred that counties and other local governments lack the same authority. (JA 225 [citing 76 Ops.Cal.Atty.Gen. 86, 89-90].) Yet the California Legislature enacted Section 19130 to solve a problem for the *State* that general law cities do not share. Article VII of the California Constitution establishes a system of civil service employment for state government. (See Cal. Const., art. VII, § 1(a).) Courts interpreting Article VII have long held that it restricts the

[9] *Jaynes* is inapposite for the additional reason that the school district there—and unlike Costa Mesa here—relied on Section 53060 as the basis for authorizing the contracting out of legal services. (*Jaynes*, *supra*, 193 Cal.App.2d at p. 49.)

use of private contractors to perform State functions. (See *Prof. Engineers v. Dept. of Transportation* (1997) 15 Cal.4th 543, 564.) The legislature enacted Section 19130 to make clear that so long as the State Government satisfies judicially-imposed conditions on the award of personal service contracts outside the civil service system, it may contract out personal service contracts to achieve cost savings. (See *California State Employees' Assn. v. State of Cal.* (1988) 199 Cal.App.3d 840, 846-847.)

General law cities, unlike the State Government, are not subject to Article VII, and are not required to establish a civil service system of government. As a result, the body of law interpreting Article VII to restrict the State's ability to contract out personal services simply does not apply to general law cities (and no case has ever held differently). The California Legislature has not enacted a parallel to Section 19130 for general law cities because, to put it simply, there is no need to.

III. THE SUPERIOR COURT ABUSED ITS DISCRETION BY PREMATURELY ENJOINING COSTA MESA FROM CONTRACTING UNDER SECTIONS 37103 AND 53060

Even assuming that Costa Mesa may only contract in the private sector for "experts" pursuant to Sections 37103 and 53060 of the Government Code, the superior court nonetheless abused its discretion by granting an injunction because there is nothing in the record to suggest that Costa Mesa, had it not been enjoined, would have violated either statutory provision.

To warrant a preliminary injunction, CMCEA "bears the burden of presenting *facts* establishing" it is reasonably likely to prevail on the merits. (*Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 355-356 [emphasis added]; see also *Ancora-Citronelle Corp. v. Green* (1974) 41 Cal.App.3d 146, 150 ["the drastic remedy of an injunction pendente lite may not be permitted except upon a sufficient factual showing"].)

Even assuming Costa Mesa does enter into contracts for certain services performed by CMCEA's members, it is impossible to discern, at this stage, whether Costa Mesa's still-to-be-entered contracts would be for services covered by Sections 37103 and 53060.

CMCEA concedes that under the Government Code, Costa Mesa is permitted to contract with private entities for "special services." But according to CMCEA, it is likely to prevail on the merits because Costa Mesa cannot contract out for any of the services for which it has served layoff notices (see JA 3), as those services are not "special," and the contractors will not be "specially trained and experienced." (See JA 83-84.) The gravamen of CMCEA's argument is that the superior court could simply look at the names of the departments potentially affected by a future contract, and infer that no special services will be involved.

But whether a service is special "is a question of fact." (*Sunnyvale*, *supra*, 36 Cal.App.3d at p. 61.) Because, according to CMCEA's evidence, Costa Mesa has done nothing more than issue one RFP—for a service that the Attorney General has expressly permitted to be contracted out—the record does not disclose numerous relevant facts, such as: (i) what the jobs to be contracted out entail; and (ii) the nature of the entities that might provide contract services. The only relevant fact in the record is the names of the departments potentially effected by Costa Mesa's efforts.

The Court of Appeal, in *SEIU*, *supra*, 47 Cal.App.4th at p. 1661, rejected the notion that a violation of the Government Code can be inferred solely from the category of the position to be contracted for. Indeed, the *SEIU* court noted that when the plaintiff, like CMCEA here, initially applied for an injunction before the defendant had entered into any contract, it properly "was denied as premature" because no contract had been entered. (*Id.* at p. 1663.) The same ruling should have issued here.

SEIU involved a community college district that sought to contract with a private entity for the operation of its campus bookstores. (*SEIU, supra*, 47 Cal.App.4th at p. 1663.) That private entity, Barnes & Noble, not only agreed to hire bookstore employees, but also agreed to provide a computerized textbook management system, a guaranteed supply of used books, and its substantial purchasing power and resulting competitive prices. (See *id.* at p. 1664.) Barnes & Noble also agreed to pay the college district more in annual fees than the district was realizing in profits. (*Ibid.*) In concluding that Section 53060 was not violated, the court reasoned that the local agency's employees could not provide the "management expertise, technological support and profits" offered by Barnes & Noble. (*Id.* at pp. 1673-1674.)

CMCEA's position that a Government Code violation can be inferred from the character of the position alone is irreconcilable with *SEIU*. A bookstore clerk, like a mechanic or street sweeper, might or might not seem like a "special" service at first blush. But whether the position can be contracted out in accordance with the Government Code simply cannot be determined until a contractor has been identified, and a contract has been entered.

Here, Costa Mesa has not yet entered into any contract with any contractor. Thus, it was impossible for the superior court, in the context of a motion for a preliminary injunction, to evaluate likelihood of success on the merits or irreparable harm because, as *SEIU* holds, it is only *after* Costa Mesa actually enters into a contract with a private entity that a court could even begin to assess whether there has been a violation of law such that an injunction, punishable by contempt, could even issue. (*SEIU, supra*, 47 Cal.App.4th at pp. 1672-1675.)

By enjoining Costa Mesa from taking discretionary action under the Government Code in the first instance, the superior court impermissibly:

(i) *assumed* that Costa Mesa will, at some future point, contract with a private firm—as opposed to a different local agency—for the provision of services; (ii) *assumed* further that those still-to-be-entered contracts will not be for "special services"; and (iii) *assumed* further that CMCEA members will lose their jobs by virtue of those still-to-be-entered contracts. In other words, the superior court *assumed* likelihood of success on the merits and irreparable harm.

But under California law, the superior court should have made the opposite assumptions. (*Ector v. City of Torrance* (1973) 10 Cal.3d 129, 133 [court must presume that in adopting statute, legislature intended to enact a valid one]; *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 511 ["[i]f the validity of a statute depends on the existence of a certain state of facts, it will be presumed that the Legislature has investigated and ascertained the existence of that state of facts before passing the law" (quotation marks and citation omitted)]; *Sac. County v. City of Sac.* (1946) 75 Cal.App.2d 436, 449 ["the courts presume that legislative acts are valid; and all doubts are to be resolved in favor of their validity"].)

In short, based upon the limited record before it, the superior court's entry of a preliminary injunction was entirely premature, and an abuse of discretion. For this independent reason, the preliminary injunction should be ordered dissolved.

IV. THE INTERIM HARM TO COSTA MESA OF AN INJUNCTION OUTWEIGHS THE SPECULATIVE HARM ALLEGED BY CMCEA

Even if CMCEA had demonstrated a sufficiently strong likelihood of success on the merits, the superior court erred in granting an injunction because "the balance of hardships dramatically favors denial" of the requested injunction. (*White v. Davis* (2003) 30 Cal.4th 528, 561.) The facts underlying the interim harm analysis are largely undisputed.

Accordingly, this Court should review the trial court's decision de novo. (See Appellant's Opening Brief, *Orange County Employees Assn. v. County of Orange*, *supra*, 2007 WL 1089013, at p. *16 [citing *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1026].) Even under the abuse of discretion standard, however, the superior court's injunction should be vacated.

The preliminary injunction inquiry requires courts to compare the interim harm that the plaintiff will suffer if the injunction is not issued compared to the interim harm that the defendant will suffer if it is. (See *IT Corp.*, *supra*, 35 Cal.3d at pp. 69-70.) Costa Mesa is not yet prepared to contract out any services to private contractors or lay off employees as a result. Thus, CMCEA's entire claim of harm is built upon speculation and assumptions—none of which can support its claim for injunctive relief. (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 207.)

On the other side of the scale, Costa Mesa has a strong interest in protecting its legislative discretion to carry out its public functions. Courts have long exercised restraint with respect to enjoining a public official from carrying out her duties. In *Huffman v. Pursue, Ltd.* (1975) 420 U.S. 592, the Supreme Court noted that in cases to enjoin state functions, courts "should abide by standards of restraint that go well beyond those of private equity jurisprudence." (*Id.* at p. 603.) "[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." (*Coalition for Economic Equity v. Wilson* (9th Cir. 1997) 122 F.3d 718, 719.)

Moreover, "[w]here, as here, the plaintiff seeks to enjoin public officers and agencies in the performance of their duties the public interest must be considered." (*Tahoe Keys*, *supra*, 23 Cal.App.4th at pp. 1472-1473.) In this case, Costa Mesa is attempting to put in motion a process for eventually contracting out services currently performed by CMCEA's

members to public or private entities, if they can perform the services better and for less money. The residents and taxpayers of Costa Mesa have a substantial interest in a local government that is able to provide better municipal services while improving its financial security.

CONCLUSION

The superior court's preliminary injunction order is contrary to law, unsupported in fact, and at best, is entirely premature. That this injunction prevents a general law city from exercising its discretionary functions raises serious constitutional concerns. The preliminary injunction order should be vacated, and the case remanded for further proceedings.

Dated: December 6, 2011

Respectfully submitted,

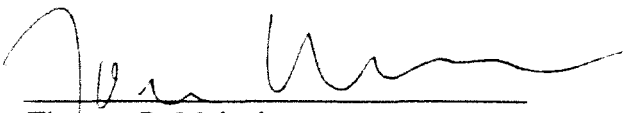
JONES DAY

By: _____
Thomas R. Malcolm

Attorney for Appellant
CITY OF COSTA MESA AND
THOMAS HATCH

RULE 8.204(C) CERTIFICATE

Pursuant to California Rule of Court 8.204(c), I certify that the foregoing brief contains 12,527 words.



Thomas R. Malcolm

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CITY OF COSTA MESA AND
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PROOF OF SERVICE

(CCP §§ 1013a, 2015.5)

I, Virgilynn S. Swanson, declare:

I am a citizen of the United States and employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 3161 Michelson Drive, Suite 800, Irvine, California 92612. On December 6, 2011, I served a copy of the within document(s): **APPELLANTS' OPENING BRIEF.**

☒ by causing personal delivery via **First Legal Support** and **National Legal Inc.**, of the document(s) listed above to the person(s) at the address(es) below.

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AND

☒ by placing the document(s) listed above in a sealed UPS envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a UPS agent for delivery.

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County of Orange, Central Justice Center
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Santa Ana, CA 92701

AND

☒ by transmitting **via e-mail or electronic transmission** a single electronic copy by PDF to the person at the address set forth below:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 6, 2011, at Irvine, California.

Virgilynn S. Swanson